Office - Supreme Court, U. S.
FILED
SEP 30 1943
CHARLES ELMORE CROPLEY
CLERK

(3)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 401

GERTRUDE KOLLER BROWN,

Petitioner,

vs.

THE SCHOOL DISTRICT OF THE CITY OF BETHLEHEM, PA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

E. G. Scoblionko,
Counsel for Petitioner.

Of Counsel:
David Getz.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary and short statement of the matter involved	1
Statement as to jurisdiction	4
(a) Statutory provision sustaining jurisdiction	4
(b) Cases believed to sustain jurisdiction	4
(c) Dates of judgment and of application for certiorari	4
(d) Nature of the case, federal questions raised, substantial questions	6
Questions presented	6
Reasons relied on for the allowance of the writ	6
Brief in support of petition for writ of certiorari	9
Conclusion	16

Table of Cases Cited.

Buchalter v. *New York*, 87 L. Ed. Adv. Op. 1088, 63 Sup. Ct. 1129	4
Columbia Water Power Co. v. *Columbia Electric St. Ry. Light and Power Co.*, 172 U. S. 475	4,12
Cumberland Coal Co. v. *Board of Revision*, 284 U. S. 23.	4,15
Indiana v. *Brand* 303 U. S. 95	4,15
Pierre v. *State of Louisiana*, 306 U. S. 354	4,12
Skinner v. *Oklahoma*, 316 U. S. 547	4,15
West Virginia State Board of Education v. *Barnette*, 87 L. Ed. Adv. Op. 1171, 63 Sup. Ct. 1178	4,15
Yick Wo v. *Hopkins*, 118 U. S. 356	4,13

Statutes Cited.

Judicial Code, Sec. 237(b) as amended, 43 Stat. 936, 28 U. S. C. 344(b)	4
Teachers' Tenure Act of 1937 (24 P. S. Section 1126)	2
Tenure Act of June 20, 1939, P. L. 482, Sec. 2 (24 P. S. 1126)	9
School Code of May 18, 1911 (P. L. 309, 24 P. S. 1162)	9
School Code of May 18, 1911, (24 P. S. 1128), Sec. 1209.	10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 401

GERTRUDE KOLLER BROWN,
vs. *Petitioner,*

THE SCHOOL DISTRICT OF THE CITY OF BETHLEHEM, PA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Gertrude Koller Brown, respectfully prays that a Writ of Certiorari issue herein to review a certain final decision of the Supreme Court of the State of Pennsylvania, and in support thereof presents the following statements, questions, and reasons:

I. Summary and Short Statement of the Matter Involved.

Gertrude Koller Brown, hereinafter called the petitioner, was engaged as a dental hygienist by the Bethlehem School

District for the school year 1932-33 and continued in that capacity until the end of the 1940-41 school year. On August 16, 1938, *after the petitioner was married,* she entered into a contract with the Bethlehem School District in the statutory form prescribed by the Teachers' Tenure Act of 1937 (24 P. S. Section 1126), providing for an annual compensation of Fifteen hundred ($1500.00) dollars (R. 17).

There was an established custom and usage of the Bethlehem School District whereby applications for sick leaves or maternity leaves were made to the Board of School Directors and granted (R. 43). In view of this fact and in the absence of any rules and/or regulations governing sick leaves and maternity leaves, your petitioner, by letter dated July 18, 1941 (R. 18), requested a sick leave. In response to a communication from the Bethlehem School District that she furnish a doctor's certificate, your petitioner transmitted a certificate from Dr. T. E. Schadt to the effect that "Mrs. Brown is pregnant and will be delivered in December" (R. 21-22).

On August 30, 1941, petitioner was notified that her request for a sick leave was denied (R. 24). After being requested to resign, petitioner's counsel, by letter dated September 25, 1941 (R. 26), advised the Bethlehem School District that the petitioner would not resign and that she desired to resume her professional duties.

Thereafter, at a regular meeting of the directors of the Bethlehem School District, held on October 31, 1941, a resolution was adopted preferring the following charges against the petitioner (R. 30):

> "1. That since September 3, 1941, Gertrude Koller Brown has been and continues to be incompetent to perform her duties as dental hygienist of this District.
>
> 2. That from September 3, 1941, thence hitherto, Gertrude Koller Brown has persistently neglected to perform said duties.

3. That from September 3, 1941, thence hitherto, Gertrude Koller Brown has persistently and wilfully violated the School Laws of this Commonwealth."

A hearing was held before the Board of Directors of the Bethlehem School District on November 17, 1941, at which time counsel for the respective parties stipulated that the charges preferred against the petitioner did not question the petitioner's educational competency, but that her incompetency arose because of her temporary physical disability resulting from pregnancy (R. 38). Petitioner was discharged and so notified by registered mail (R. 49-51).

In accordance with the statutory procedure provided in the Teachers' Tenure Act, *supra*, petitioner appealed to the Superintendent of Public Instruction at Harrisburg, Pennsylvania (R. 40), who, after hearing the matter, reversed the decision of the Bethlehem School District and directed the petitioner's reinstatement (R. 6-12).

The Bethlehem School District appealed to the Court of Common Pleas of Northampton County, Pennsylvania, where the matter was submitted upon the record and testimony taken at the original hearing. After oral argument, the Court of Common Pleas affirmed the decision and order of the Superintendent of Public Instruction.

The Bethlehem School District then appealed to the Superior Court of the Commonwealth of Pennsylvania and said Court reversed the order of the Court of Common Pleas of Northampton County, to which order, however, Rhodes, J. dissented (R. 73).

The Supreme Court of Pennsylvania, the State court of last resort, allowed an appeal upon petitioner's application (R. 80). Thereafter, the judgment of the Superior Court was affirmed per curiam (R. 81).

Petitioner then presented a petition for reargument alleging specifically the Federal questions involved, which petition was refused on June 30, 1943, without an opinion.

II. Statement as to Jurisdiction.

(a) *Statutory Provision Sustaining Jurisdiction.*

The jurisdiction of the United States Court in this case is predicated on Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. A. 344 (b).

(b) The following cases sustain the jurisdiction of this Court:

Columbia Water Power Co. v. *Columbia Electric Street Railway, Light & Power Co.*, 172 U. S. 475.
Cumberland Coal Co. v. *Board of Revision*, 284 U. S. 23.
Yick Wo v. *Hopkins*, 118 U. S. 356.
Indiana v. *Brand*, 303 U. S. 95.
Pierre v. *State of Louisiana*, 306 U. S. 354.
Skinner v. *Oklahoma*, 316 U. S. 547.
West Virginia State Board of Education v. *Barnette, et al.*, 87 L. Ed. Adv. Ops. 1171, 63 Sup. Ct. Rep. 1178.
Buchalter v. *New York; Weiss* v. *New York; Capone* v. *New York*, 87 L. Ed. Adv. Op. 1088, 63 Sup. Ct. Rep. 1129.

(c) *Dates of Judgment and Application for Certiorari.*

The Judgment of the Supreme Court of Pennsylvania (R. 81) affirming the order of the Superior Court of Pennsylvania (R. 73) was rendered on May 26, 1943. A petition for reargument (R. 81) was filed on June 3, 1943 and denied in a per curiam order, on June 30, 1943. This application is presented on the 30th day of Sept., 1943.

(d) *Nature of the Case, Federal Question Raised, Substantial Questions.*

This proceeding was originally instituted by the Board of Directors of the School District of the City of Bethlehem

to dismiss the petitioner as a professional employee from said district after her request for a sick or maternity leave had been refused. The petitioner appealed to the Superintendent of Public Instruction under the provisions of the Teachers' Tenure Act, *supra.*

The Federal question sought to be reviewed was first presented in the petition addressed to the Superintendent of Public Instruction for a hearing pursuant to the provisions of the Teachers' Tenure Act, *supra,* wherein it was alleged, first—that the action of the Bethlehem School District was unjust, inequitable and discriminatory in that the said Bethlehem School District had accorded sick leaves under similar circumstances, and further that the action against your petitioner was one of a series of acts undertaken to intimidate, demoralize and coerce all married female employees into resigning (R. 43). This discrimination was particularly raised and its contravention to the fourteenth amendment was stated in the written brief and oral argument before the Superintendent of Public Instruction and in the Court of Common Pleas of Northampton County, Pennsylvania. The petitioner's position was sustained without specific reference to the Federal question.

In the Superior Court and in the Supreme Court, your petitioner maintained that the action of the Bethlehem School District was discriminatory and, in effect, an attack upon the institution of marriage. It was maintained that "any rule or regulation prohibiting a female professional employee, who is legitimately pregnant, from taking a sick leave in the event of pregnancy upon penalty of dismissal, was arbitrary, unreasonable, contrary to public morals, offensive to some religious concepts, and in effect, a restraint upon the exercise of free and wholesome marital relationship."

The Superior Court expressly found that your petitioner was not being discriminated against (R. 77). In the peti-

tion for reargument before the Supreme Court of Pennsylvania, the Federal question was again raised (R. 81-82). This petition was denied.

This case raises a substantial question of Federal law not heretofore considered by the United States Supreme Court—whether or not a board of education has the authority, in the absence of any rules and regulations governing sick and maternity leaves, and in view of a long established custom whereby professional employees under its jurisdiction have been granted such leaves, to arbitrarily single out a married female professional employee and dismiss her because of her temporary physical disability resulting from pregnancy.

III. The Questions Presented.

(a) Has a board of school directors denied a married professional employee the equal protection of the laws as secured by the fourteenth amendment to the United States Constitution, who is dismissd for incompetency solely on the ground of temporary physical disability resulting from pregnancy, in the absence of any rule or regulation of the board governing maternity or sick leaves, and contrary to established custom and practice whereby leaves of absence were granted for illness, accident or other temporary physical disability to other professional employees?

(b) If a board of school directors *engages married female professional employees*, under the provisions of a "tenure" act, is it contrary to the fourteenth amendment of the United States Constitution, and public policy, to dismiss said employees if they become temporarily disabled solely by reason of pregnancy?

IV. Reasons Relied On for the Allowance of the Writ.

(a) None of the foregoing questions have been answered by this Court and the State courts have not adequately

disposed of these questions. The Supreme Court of Pennsylvania, while affirming the order of the Superior Court of Pennsylvania (R. 73), which failed to conclude that petitioner was being discriminated against because of her legitimate pregnancy, nevertheless observed that "school boards should adopt reasonable rules" to avoid difficulties similar to the case at bar (R. 81). This observation, however, does no answer petitioner's contention of discrimination in the absence of such reasonable rules. Furthermore, it sanctions arbitrary and capricious action on the part of school boards and, in effect, rewards school boards who neglect to adopt reasonable rules by authorizing them to act according to their whims and fancies without uniformity.

(b) The questions presented are serious and vital to the entire body of professional employees in the various school districts of Pennsylvania. In the Supreme Court of the State of Pennsylvania, the Pennsylvania State Education Association, representing fifty-seven thousand (57,000) professional employees, intervened as an interested party (R. 83), filed a brief and submitted oral argument. In addition, this group submitted a petition for joinder in the reargument alleging the Federal question involved.

(c) The questions presented are especially serious and vital in war time when married women are called upon to replace men in the industrial and professional fields. The problem resolves itself into the determination of whether or not married women, otherwise secure in their employment, must forego motherhood as a condition precedent for continued employment.

Petitioner presents herewith her brief in support of the petition.

Wherefore your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Penn-

sylvania, requiring that Court to certify the whole record of the case herein to this Court for review and determination.

GERTRUDE KOLLER BROWN,
Petitioner,

By E. G. SCOBLIONKO,
Counsel.

DAVID GETZ,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In Pennsylvania, the legislature has set up a tenure system for teachers and other professional employees, which provides in part as follows (Tenure Act of June 20, 1939, P. L. 482, Sec. 2, (24 P. S. 1126)):

> "(a) The only valid causes for termination of a contract entered into with a professional employe in accordance with the provisions of this section shall be * * * immorality, *incompetency*, intemperance, cruelty, persistent negligence, mental derangement, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employe.
>
> "In determining whether a professional employe shall be dismissed for *incompetency*, the professional employe shall be rated by an approved rating system which shall give due consideration to personality, preparation, technique, and pupil reaction, in accordance with standards and regulations for such scoring as defined by rating cards to be prepared by the Department of Public Instruction immediately following the effective date of this act, and to be revised, from time to time, by the Department of Public Instruction with the cooperation and advice of a committee appointed by the Superintendent of Public Instruction, including representation from county and district superintendents of schools, classroom teachers, school directors, school supervisors, and such other groups or interests as the Superintendent of Public Instruction may deem appropriate * * *
>
> "No teacher shall be dismissed under this act unless such rating records have been kept on file by the board of school directors."

The School Code of May 18, 1911 (P. L. 309, 24 P. S. 1162), which is also part of the general tenure system, provides:

> "Whenever a teacher is prevented by sickness or some other unavoidable circumstance from following

> his or her occupation, the school district may, at the discretion of the directors, make such payments of compensation during the period of absence from duty as the exigencies of the case may seem to warrant: Provided, That in the case of sickness, no payments shall be made unless such teacher shall have furnished to the board of school directors a certificate from a physician stating the nature of the sickness and certifying that he or she was unable to perform duties as a teacher."

and Section 1209, 24 P. S. 1128, provides:

> "Any principal or teacher who, unless released by the board of school directors, refuses or neglects to teach through the term for which he was engaged, except when prevented by personal illness, shall be disqualified from teaching in any public school in this Commonwealth during the term of said contract."

The Superior Court of Pennsylvania (R. 75) construed the term "incompetency," as used in the Tenure Act, *supra*, to embrace "lack of physical ability". It is recognized that the statutory construction of that term is binding upon this Court. However, the Superior Court also concluded that there was no "abuse" in the administrative process of determining whether there existed a "substantive basis" for dismissal. Thus, the Superior Court not only construed the statutory term "incompetency", but concluded that there was no discrimination against the petitioner because of marriage or pregnancy (R. 76-77).

Petitioner respectfully maintains that the learned Superior Court and Supreme Court of Pennsylvania, erred in the conclusion that the Board of Directors of the Bethlehem School District did not act in a discriminatory and arbitrary manner so as to deny the petitioner the "equal protection of the laws" guaranteed by the fourteenth amendment of the United States Constitution.

The Court's attention is respectfully invited to the following allegations made in the appeal to the Superintendent of Public Instruction (R. 43) which are undenied and therefore must be accepted as facts:

"20. That the resolution of the School District is contrary to the public policy and public welfare of the Commonwealth of Pennsylvania, in that it places abnormal restrictions upon married female teachers lawfully holding professional contracts with the School District of the City of Bethlehem.

"21. That the aforesaid resolution is unjust, inequitable, and discriminatory in that the Bethlehem School District has in the past accorded sick leaves in cases similar to the one in issue.

"22. Your Petitioner further maintains that the present proceeding is founded in bad faith and is one of a series of acts perpetrated by the Bethlehem School District in an attempt to intimidate, demoralize and coerce all married female teachers into resigning, and respectfully submits the following pertinent facts in support thereof, to wit:

"(a) A proceeding similar to the one at bar was instituted by the Bethlehem School District against your Petitioner on October 26, 1939 which was decided on January 23, 1940, adversely to the Bethlehem School District.

"(b) A newspaper campaign was instituted by the Bethlehem School District during the months of June and July, 1940, threatening the dismissal of all married female teachers unless they resigned.

"(c) The Bethlehem School District sent registered letters, under date of June 29, 1940, to thirty-three married female teachers, requesting resignations on or before July 15, 1940, a sample copy of which is hereto attached, marked Exhibit "J", and expressly made a part hereof.

It is respectfully submitted that these averments sufficiently raise the Federal constitutional questions. *Columbia Water Power Company* v. *Columbia Electric Street Railway, Light & Power Co.*, 172 U. S. 475.

These allegations, which remain undenied, clearly reveal the arbitrary and discriminatory action of the Board of Directors of the Bethlehem School District. They refute the Superior Court's finding of impartiality and lack of abuse and substantiate the petitioner's allegation that she was being discriminated against solely because of the fact that she was a married professional employee temporarily disabled by reason of the incidence of childbirth. Petitioner maintains that because of the condition peculiar to her sex and marital status, she has been discriminated against and denied the equal protection of the laws guaranteed to all individuals regardless of sex or marital status by the fourteenth amendment to the Federal Constitution.

This Court has held in *Pierre* v. *Louisiana*, 306 U. S. 354, that where a question of the deprivation of a constitutional right by the action of state officials involves the conclusions reached by the state court, whose decision is being reviewed, upon the questions of fact involved, such conclusions are not controlling and it is the duty of the Supreme Court to make independent inquiry and determine the disputed facts.

The *Pierre* case is analogous to the case at bar. There, the petitioner, a negro, alleging exclusion of negroes from the Grand Jury which indicted him, did not maintain that the Louisiana laws required an unconstitutional exclusion of negroes but maintained that Louisiana, acting through its administrative officers, had deliberately and systematically excluded negroes.

The Louisiana Supreme Court concluded that the petitioner failed to establish that negroes were excluded on account of race, but that their exclusion was the result of a bona fide compliance by the Jury Commission with State

laws prescribing jury qualifications. This Court at page 358 said:

> "The fourteenth amendment intrusts those who because of race are denied the equal protection of the laws in a State first 'to the revisory power of the higher courts of the State and ultimately to the review of this Court'."

In the case at bar, petitioner does not allege that the Tenure Act or that the State court's interpretation of the term "incompetency", are unconstitutional, but only that the application and administrative action of the Bethlehem School District has been "abused" and is unconstitutional.

A similar situation arose in the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, wherein it was alleged that an ordinance, although not void on its face, was nevertheless void by reason of the administration which operated so unequally as to punish one for what is permitted to others without any distinction of circumstances.

Mr. Justice Matthews, speaking for the Court, said at page 373:

> "In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the

broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; Ex Parte Virginia, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370; and *Soon Hing* v. *Crowley*, 113 U. S. 703."

Petitioner does not maintain that the Board of Directors of the Bethlehem School District is without power to adopt reasonable rules and regulations governing maternity leaves and sick leaves, nor that the Bethlehem Board is without authority to dismiss a professional employee for incompetency due to lack of physical ability to perform. But it is respectfully urged that since the Bethlehem District engages married female professional employees without imposing upon them any special restrictions concerning childbirth, they are entitled to the same reasonable privileges of sick leave as are other employees who become temporarily disabled by reason of other illness and accident. Although the State Court has said that the determination of what constitutes lack of physical ability is discretionary with the board, it also recognized that the determination must be free from "abuse" (R. 77).

The Tenure Act, *supra*, does not distinguish between male and female employees, nor between married and single employees. Hence, it is maintained that there is no difference in fact or law between a temporary disability occasioned by an automobile accident and one occasioned by reason of pregnancy. The Bethlehem Board could not, and therefore did not, deny petitioner's allegation (R. 43) that

leaves of absence were granted under circumstances similar to the one at bar.

It is therefore respectfully submitted that the instant case is ruled by *Yick Wo* v. *Hopkins, supra,* and by *Skinner* v. *Oklahoma,* 316 U. S. 534, wherein this Court recently reiterated that when a law lays an unequal hand on those who have committed "intrinsically the same quality of offense * * * it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." See also *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23; *Indiana* v. *Brand,* 303 U. S. 95.

The Superior Court in its opinion (R. 76-77) stated that the petitioner was not being discriminated against because of her marriage, nor was her dismissal due to her legitimate pregnancy, but because she became incompetent due to her condition. The State Court accepted the Board's argument that petitioner's pregnancy was only a circumstance which in no way influenced its action. It is respectfully submitted that this is specious reasoning and is an obvious attempt to circumvent the real issue.

In *West Virginia State Board of Education* v. *Barnette, et al.,* 87 L. Ed. Adv. Ops. 1171, the West Virginia Board of Education adopted a resolution requiring all children to salute the flag. Failure to conform was construed to be "insubordination" dealt with by expulsion. Readmission was denied until compliance and if the child refused to comply, action could be taken against the child and his parents for delinquency.

If the State Court's reasoning in the instant case is translated to the *Barnette* case, it could be maintained that the failure to salute *was only an incident* to the child's insubordination. Any action taken against the child was due to insubordination and the consequent delinquency, and not because of failure to salute the flag.

The *Barnette* decision definitely brought the actions of Boards of Education within the scrutiny of this Court. It was stated thus:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."

The policy of our laws favors marriage and the birth of children. There is no provision in the Tenure law of Pennsylvania, nor in any other statute, nor any principle of the common law, which justifies the inference of a public policy which concededly sanctions the employment of married women as teachers and considers as grounds for expulsion the act of a married woman in giving birth to a child. Married women being lawfully employed as teachers and excusable for absence caused by personal illness, the idea that because the illness resulting in absence is caused by maternity it therefore becomes "incompetency" or "neglect of duty" is repugnant to the basic law of the land and good morals.

This Court has recognized that "marriage and procreation are fundamental to the very existence and survival of the race", (*Skinner* v. *Oklahoma, supra*), and that the fourteenth amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions which, not infrequently, are designated as "the law of the land" (*Buchalter, et. al.*, v. *New York; Weiss* v. *New York; Capone* v. *New York*, 87 L. Ed. Adv. Op. 1088, 63 Sup. Ct. Rep. 1129).

Conclusion.

In conclusion, it is urgently maintained that the petitioner was deprived of the equal protection of the laws

guaranteed by the fourteenth amendment to the Federal Constitution by the action of the Board of Directors of the Bethlehem School District in denying her a leave of absence for maternity, contrary to an established policy to grant leaves of absence for other illness and accident. It is maintained that such action is an attack upon the sacred institution of marriage and motherhood.

Respectfully submitted,

E. G. Scoblionko,
Attorney for Petitioner.

Of Counsel
David Getz.

(8115)

Office - Supreme Court, U. S.
FILED
OCT 22 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 401

GERTRUDE KOLLER BROWN,

Petitioner,

vs.

THE SCHOOL DISTRICT OF THE CITY OF BETHLEHEM, PA.,

Respondent.

BRIEF OF THE SCHOOL DISTRICT OF THE CITY OF BETHLEHEM, PENNSYLVANIA, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HERBERT J. HARTZOG,
Attorney for Respondent.

INDEX.

Subject Index.

	Page
Statement of the case	1
Argument	3
Point 1	3
Point 2	8
Conclusion	10

Cases Cited.

American Surety Co. v. *Baldwin*, 287 U. S. 156	5
Batrus' Appeal, 148 Pa. Super., 587	5
Bell Telephone Co. v. *Van Dyke*, 296 U. S. 533	8
Buchalter v. *New York; Weiss* v. *New York; Capone* v. *York*, 87 L. Ed. Adv. Op. 1088, 63 Sup. Ct. Rep. 1129	8
Columbia Water Power Co. v. *Columbia Elec. St. Rwy. Light and Power Co.*, 172 U. S. 475	6
Cumberland Coal Co. v. *Board of Revision*, 284 U. S. 23	6
Fox Film Corp. v. *Muller*, 296 U. S. 207	8
Gibbes v. *Zimmerman*, 290 U. S. 326	4
Honeyman v. *Hanan*, 300 U. S. 14	9
Horosko v. *Mt. Pleasant Twp. Schl. Dist.*, 335 Pa. 369, certiorari denied in 308 U. S. 553	9
Indiana v. *Brand*, 303 U. S. 95	7
Live Oak Water Users' Asso. v. *Railroad Commission*, 269 U. S. 354	8
Lynch v. *New York*, 293 U. S. 52	5
New York Cent. R. Co. v. *New York*, 186 U. S. 269	4
Oxley Stave Co. v. *Butler County*, 166 U. S. 648	4
Patterson v. *Stanolind Oil & G. Co.*, 305 U. S. 376	9
Pierre v. *State of Louisiana*, 306 U. S. 354	7
Skinner v. *Oklahoma*, 316 U. S. 547	7
Southwestern Bell Tel. Co. v. *Oklahoma*, 303 U. S. 206	6

Page

West Virginia State Board of Education v. *Barnette et al.*, 87 L. Ed. Adv. Ops. 1171, 63 Sup. Ct. Rep. 1178 8
Woolsey v. *Best*, 299 U. S. 1 8
Yick Wo v. *Hopkins*, 118 U. S. 356 7
Zadig v. *Baldwin*, 166 U. S. 485 5

STATUTES CITED.

Pennsylvania Statute of May 18, 1911, P. L. 309, as amended by Act of June 20, 1939, P. L. 482, 24 P. S. Sect. 1126 (j) 4
Pennsylvania Statute of June 20, 1939, P. L. 482, 24 P. S. Section 1126 (a) 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 401

GERTRUDE KOLLER BROWN,

Petitioner,

vs.

THE SCHOOL DISTRICT OF THE CITY OF BETHLEHEM, PA.,

Respondent.

BRIEF OF THE SCHOOL DISTRICT OF THE CITY OF BETHLEHEM, PENNSYLVANIA, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The Petitioner's "Summary and Short Statement of the Matter Involved" (hereinafter called the "Statement") is acceptable, subject to the following corrections and additions of material omissions:

1. Correction:

In the Statement (Page "2" thereof) the Petition states that "there was an established custom and usage of the Bethlehem School District whereby applications for sick leaves or maternity leaves were made to the Board of School Directors and granted (R. 43)". An examination

of the Record (R. 43) discloses no such fact. Furthermore, the said Record reference is a quotation of allegations from Petitioner's Petition to the State Superintendent of Public Instruction praying for a hearing *de novo* (R. 44). Such hearing was held but the Record is barren of any proof of facts supporting that allegation.

2. Correction:

The Petitioner's Statement declares that Petitioner was "requested to resign" (Page "2"). The Record shows merely, however, that she was afforded an opportunity to resign (R. 24-25) and the Superior Court of Pennsylvania so found (R. 74).

3. Correction:

The Petitioner's Statement (Page "3" thereof) declares that counsel stipulated "that the charges preferred against the Petitioner did not question the Petitioner's educational competency, but that her incompetency arose because of her temporary physical disability resulting from pregnancy (R. 38)". The Record shows that the stipulation was that the charge of incompetency was limited to Petitioner's present physical disqualification "to perform the duties of her office (R. 38)"; to her "physical incompetency to perform the duties for which she was employed (R. 38)". There was no stipulation as to the degree or duration of the admitted physical incompetency.

4. Omission:

The Petitioner's Statement fails to state that no testimony was offered by Petitioner in support of her allegations in her Petition for a hearing before the State Superintendent of Public Instruction, particularly as to Paragraphs "21" and "22" thereof (R. 43-44), at the *de novo* hearings, first, before the State Superintendent, and second,

in the Court of Common Pleas of Northampton County, Pennsylvania. No facts supporting those allegations were found either by the State Superintendent (R. 6, *et seq.*), or by the Court of Common Pleas of Northampton County (R. 52, *et seq.*), or by the Superior Court of Pennsylvania (R. 74, *et seq.*), or by the Supreme Court of Pennsylvania (R. 81, 83).

5. Omission:

By letter, dated August 24, 1941 (Exhibit 7), Dr. R. M. Walls, head of the Dental Department of the School District, recommended to the Board that the Petitioner's position be filled "as the entire dental program is built around the full time services of two hygienists", of which the Petitioner was one (R. 22-23).

By letter, dated October 27, 1941, Dr. Frank Biro, Jr., chief medical inspector of the School District, advised the Board that "we further feel it our duty to point out that with only one dental hygienist it is impossible to carry out the medical program with the desirable efficiency" (R. 27).

The Record further shows that the Board promptly endeavored to secure a satisfactory substitute for the specialized duties of the Petitioner, but its efforts were attended with difficulties (R. 31-32 and 39-40).

ARGUMENT.

Point 1.

The Record discloses no Federal question was properly presented to or actually decided at any stage of the proceedings below.

Preliminarily, it should be borne in mind that this matter was heard in five tribunals—the School Board, the State Superintendent of Public Instruction, the Court of Common

Pleas of Northampton County, the Superior Court and the Supreme Court of Pennsylvania, all in strict conformity with Pennsylvania statutory requirements. In the Supreme Court it was twice considered—at the original argument and on the petition for re-argument. Not until the petition for reargument before the Supreme Court was an attempt made to raise a Federal question. The Supreme Court denied that petition without opinion.

We consider, first, Petitioner's "Statement as to Jurisdiction" (Page 4-6 of petition), and the manner in which the alleged Federal question was supposedly raised and considered below.

Petitioner asserts that the Federal question sought to be reviewed was first presented in her petition to the State Superintendent of Public Instruction (R. 40-43), for a hearing and refers to certain of her *allegations* in that petition to the effect that the School Board's action was discriminatory.

Not only was there no specific averment that the Board's action was in contravention of the Fourteenth Amendment of the Constitution of the United States (*Oxley Stave Co.* v. *Butler County*, 166 U. S. 648; *New York Cent. R. Co.* v. *New York*, 186 U. S. 269; *Gibbes* v. *Zimmerman*, 290 U. S. 326), but no proof of any facts supporting the said allegations was offered. Petitioner had abundant opportunity to present such proof, if she had any, at the hearing before the School Board and at the *de novo* hearings before both the State Superintendent of Public Instruction and the Court of Common Pleas. See Section 1205 of the School Code of Pennsylvania, Act of May 18, 1911, P. L. 309, as last amended by Act of June 20, 1939, P. L. 482, 24 P. S. 1126 (j).[1]

[1] Parenthetically, to overcome this deficiency in proof on Petitioner's part, she urges in her Argument (Pages 11 and 12 thereof) that Respondent's failure to deny her unproven allegations obliges this Court to

Moreover, what Petitioner's counsel may have stated in his written Brief and oral argument before the State Superintendent, or in the later hearing on appeal in the Common Pleas Court, forms no part of the Record, nor is it entitled to any consideration here: *Zadig* v. *Baldwin*, 166 U. S. 485; *Lynch* v. *New York*, 293 U. S. 52.

The same is true with respect to Petitioner's reference and quotation from her Brief and argument in the Superior and Supreme Courts of Pennsylvania (Page 5 of her petition). That reference and quotation are improper, forming no part of the Record, and cannot be used to sustain a claim of Federal jurisdiction: *Lynch* v. *New York, supra.*

Under Pennsylvania Appellate Court practice, the appellant's assignments of error constitute the pleadings on appeal and the scope of the Appellate Court's consideration of the appeal is limited to the matters assigned as error. In other words, nothing is in issue except matters specifically raised thereby. The Petitioner (appellant in the Supreme Court below) assigned four errors only (R. 64-68). In none of them is a Federal question raised either directly or by implication. Not until after the Supreme Court had filed its per curiam Opinion affirming the Superior Court did the Petitioner, by her petition to the Supreme Court for re-argument, attempt to raise a Federal question for the first time. The Supreme Court denied the re-argument petition without comment. Obviously, the attempt to engraft a Federal question on the proceeding is an afterthought, without merit, and too late: *American Surety Co.* v. *Baldwin*, 287 U. S. 156.

---

accept them as facts. Under the School Code, *supra*, and the uniform practice in such cases, no answer by the Respondent to a petition for a hearing *de novo* is required. On a hearing *de novo*, the case is heard anew and until and unless the Petitioner offered proof of her allegations, there was nothing that Respondent could or was required to deny. See, e. g., *Batrus' Appeal*, 148 Pa. Super. 587, 594.

Furthermore, what the Petitioner now attempts to label a Federal question was not decided at any stage below. The Petitioner admits (Page 5 of her petition) that no specific reference to any Federal question was made in the Opinions of the State Superintendent and Common Pleas Court. The Record shows that the Opinions and Orders of the Superior and Supreme Courts are wholly devoid of any reference to or consideration of any Federal question (R. 73, 80). These facts, of themselves, resolve against the right of Federal review: *Southwestern Bell Tel. Co.* v. *Oklahoma*, 303 U. S. 206.

The petition for the writ (Page 5 thereof) refers to the dictum of the Superior Court that the Petitioner was not being discriminated against because of her marriage (R. 76). The incomplete reference to this portion of the Superior Court's Opinion is presumably intended to convey the idea that a Federal question had been properly raised and actually passed upon by the Court. Neither is true. A careful reading of the Superior Court's Opinion shows that it was using the word "discriminated" in its ordinary and common usage, and not in the limited constitutional sense. This is necessarily true because that Court was not confronted with any specific constitutional issue, nor was it essential to a proper disposition of the case.

As to the cases cited by the Petitioner to sustain the jurisdiction of your Honorable Court, none of them is in point on the facts. We consider them, *seriatim:*

In *Columbia Water Power Co.* v. *Columbia Electric Street Railway, Light & Power Co.*, 172 U. S. 475, the question whether there was an impairment of the obligation of plaintiff's contract by subsequent state action clearly appeared on the face of the Record from a reading of the complaint and answer.

In *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, a petition for re-argument was presented to the Supreme

Court of Pennsylvania averring that a constitutional right had been violated. The Record in that case showed that the Pennsylvania Supreme Court actually considered that contention and expressly overruled it, which under the precedents gave the Supreme Court of the United States jurisdiction to review. It is clearly distinguishable from our case. As heretofore stated in this Brief, the Order of the Pennsylvania Supreme Court denying the Petitioner's application for re-argument is barren of any consideration or decision respecting any Federal question.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, the Record contains proven facts establishing an administration of ordinances directed against a particular class of persons amounting, as the Court found, to a denial of the equal protection of the laws. That is not true in our case. Here, the Petitioner made scandalous and irrelevant allegations which she never attempted to prove in the several forums below, where the matter was heard *de novo* and where she had opportunity to do so. Not having done that, it must be apparent how baseless were her allegations in this respect.

In *Indiana* v. *Brand*, 303 U. S. 95, it appeared that the Court below deemed that a Federal question was properly before it and actually entertained and decided that question adversely to the Federal right asserted. Under such circumstances, it was clear that the Supreme Court of the United States had jurisdiction to review the final judgment entered below.

In *Pierre* v. *State of Louisiana*, 306 U. S. 354, the Federal question was raised at the inception of the proceedings by a timely motion to quash the indictment and jury panels and alleging adequate Federal grounds, and which the Court below actually considered.

The case of *Skinner* v. *Oklahoma*, 316 U. S. 547, is in the same category. There petitioner challenged the con-

stitutionality of the Oklahoma Habitual Criminal Sterilization Act on the ground that it violated the Fourteenth Amendment of the United States Constitution. In the Court of original jurisdiction, petitioner filed an answer squarely raising the constitutional issue which was considered and passed upon by the Court below.

In *West Virginia State Board of Education* v. *Barnette, et al.*, 87 L. Ed. Adv. Ops. 1171, 63 Sup. Ct. Rep. 1178, the flag salute case, the Federal question was directly put in issue by the pleadings and decided by the Court below.

In *Buchalter* v. *New York; Weiss* v. *New York; Capone* v. *New York*, 87 L. Ed. Adv. Op. 1088, 63 Sup. Ct. Rep. 1129, it appeared that the remittiturs of the Court of Appeals recited that the appellants in Brief and argument raised the point that they had been denied their constitutional rights under the Fourteenth Amendment to the United States Constitution *and* that this point was considered and necessarily decided. Those particular facts distinguish that case from ours.

POINT 2.

The decision of the Superior Court, affirmed by the Supreme Court of Pennsylvania, rests upon an adequate, fair and substantial non-federal ground.

It is well settled that where the State Court decision rests on an adequate, non-Federal ground, the Supreme Court of the United States has no jurisdiction of the case: *Fox Film Corp.* v. *Muller*, 296 U. S. 207; *Bell Telephone Co.* v. *Van Dyke*, 296 U. S. 533; *Live Oak Water Users' Assoc.* v. *Railroad Commission*, 269 U. S. 354; *Woolsey* v. *Best*, 299 U. S. 1.

Corollaries to the foregoing principle are that (a) before the Supreme Court of the United States will exercise its right of review it must appear that the disposition of a

Federal question is necessary to the determination of the cause; *Honeyman* v. *Hanan*, 300 U. S. 14; and (b) that the Supreme Court will decline jurisdiction where it appears that the question presented by the appellant "is not, and was not at the time of appealing, substantial in character": *Patterson* v. *Standolind Oil & G. Co.*, 305 U. S. 376; *Honeyman* v. *Hanan*, supra.

The application of these principles to the facts of our case resolves against Federal jurisdiction. The Petitioner was discharged after strict conformity with the statutory requisites of Pennsylvania. The Petitioner does not question the procedure. Of the three statutory grounds for discharge averred, the case was ultimately decided on the first ground, namely, "incompetency". The real question involved was the construction of the word "incompetency" as used in Section 2 of the Teachers' Tenure Act, as amended by Act of June 20, 1939, P. L. 482, 24 P. S. 1126 (a); that is, whether incompetency was limited to educational qualifications, or whether it included lack of physical ability to perform the duties incident to the employment (See R. 75). A reading of the Record will disclose that the substantial issue in all of the several forums below was this question. The only other matters urged and considered below were also the construction and application of companion sections of the School Laws of Pennsylvania. No Federal question was broached until the belated petition for re-argument in the Supreme Court of Pennsylvania.

That the decision in our case by the Supreme Court of Pennsylvania rests upon adequate, fair and substantial non-Federal grounds is apparent from a Pennsylvania case almost on all fours with ours. We refer to *Horosko* v. *Mt. Pleasant Twp. Schl. Dist.*, 335 Pa. 369. In that case, the definition of the same word, "incompetency", as used in the School Laws of Pennsylvania, was directly in issue. The Pennsylvania Supreme Court, in a precedent-making deci-

sion, held for a broad construction of that word, and that it was not limited to educational qualifications. A petition for certiorari was presented to your Honorable Court and denied: 308 U. S. 553.

One other matter requires brief comment and correction. In the "Reasons" relied on by the Petitioner for the allowance of the writ (Page 7 of the petition), it is stated that the Pennsylvania State Education Association, the intervenor in the Supreme Court below, "submitted a petition for joinder in the re-argument alleging the Federal question involved". The Record shows otherwise (R. 83-84). The intervenor's petition raised no Federal question whatsoever. On the contrary, the intervenor confines itself therein to questions involving solely Pennsylvania statutes and the interpretation thereof by the Courts of Pennsylvania. Nothing could be more convincing than that the intervenor concluded that only non-Federal grounds were involved in the case.

Conclusion.

The Respondent has not discussed the substantive merits. We believe it to be unnecessary. The Petitioner has shifted her ground in this Court. She now concedes that the construction of the word "incompetency" by the Pennsylvania Appellate Courts in this case, as including "lack of physical ability" is final and binding upon this Court (Page 10 of the petition); but now attempts to rely upon alleged administrative abuse without proof of any facts in support thereof. On the contrary, the Superior Court, affirmed by the Supreme Court, expressly found that "we are unable to discover any indication of an abuse thereof" by the School District (R. 77).

The Record itself discloses the absence of Federal jurisdictional requisites, and we respectfully submit that the

case is, therefore, not a proper one for review by certiorari in this Court, and that the petition for the writ should be denied.

HERBERT J. HARTZOG,
Attorney for Respondent.

(8467)